

File

**BEFORE THE  
STATE OF WISCONSIN  
Division Of Hearings And Appeals**

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Application of Harold J. Eichstadt to Place Riprap  
and Fill Material on the Bed of Lake Winneconne,  
Town of Winneconne, Winnebago County,  
Wisconsin

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Case No. 3-LM-96-0088

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

Mr. Harold Eichstadt, 1820 Vinland Road, Oshkosh, Wisconsin, 54901, filed an application with the Department of Natural Resources on February 14, 1996, pursuant to sec. 30.12(3)(a), Wis. Stats., for a permit to place rock riprap along 300 feet of shoreline on Lake Winneconne. The proposed project is located in the NW 1/4, NW 1/4, Section 18, Township 19 North, Range 15 East, Town of Winneconne, Winnebago County, Wisconsin.

On May 9, 1996, the Department of Natural Resources issued Findings of Fact and Conclusions of Law denying the issuance of the permit to Mr. Eichstadt.

On June 10, 1996, Mr. Eichstadt, by his attorney Daniel M. Muza, requested a contested case hearing pursuant to sec. 227.42, Wis. Stats. By letter dated June 26, 1996, the Department granted the request for contested case hearing. On January 10, 1997, the Department filed a Request for Hearing with the Division of Hearings and Appeals.

Pursuant to due notice hearing was held on April 22, 1997, at Oshkosh, Wisconsin Jeffrey D. Boldt, administrative law judge (the ALJ) presiding.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Mr. Harold Eichstadt, by

Daniel M. Muza, Attorney  
217 Ceape Avenue  
Oshkosh, Wisconsin 54902

Department of Natural Resources, by

Michael Cain, Attorney  
P. O. Box 7921  
Madison, Wisconsin 53707

## FINDINGS OF FACT

1. Harold J. Eichstadt, 1820 Vinland Road, Oshkosh, Wisconsin, 54901, completed filing an application with the Department for a permit under sec. 30.12, Stats., to place rock riprap below the ordinary highwater mark (OHWM) on Lake Winneconne, Village of Winneconne, Winnebago County. The Department and the applicant have fulfilled all procedural requirements of secs. 30.12 and 30.02, Stats.

2. The applicant owns real property located in the NW 1/4 of NW 1/4 in Section 18, Township 19 North, Range 15 East, Winnebago County. The above-described property abuts Lake Winneconne which is navigable in fact at the project site.

3. The applicant proposes to place shore protection measuring 10 feet wide, 5 feet high and 300 feet long below the OHWM on Lake Winneconne. The existing bank slope is 4' (horizontal) to 1' (vertical). The proposed bank slope would be 2:1. The shore protective material would consist of sand and clay fill material and rock riprap. The riprap would consist of approximately 600 cubic yards of various sized stone. The applicant also seeks to fill in the area behind the sand ridge abutting the existing shoreline of Lake Winneconne. The bottom material in this area is very wet. The proposed fill would consist of clay and sand. (Exhibit 4) Approximately .6 of an acre would be filled.

4. The purpose is to fill in a low area, protect the existing shore from further erosion and make the applicant's parcel better suited for development. The applicant has owned the subject parcel for over 30 years. The property was in his family even prior to this time. During this period, he estimates he has lost some 20 feet to erosion. The applicant also believes he has lost 4 feet since he installed riprap in 1992. If the proposed fill is granted, the applicant would be able to develop a larger portion of his property because he would be able to develop lots beyond the 75 foot minimum setback from a pond he created at the site. It is his hope that city sewer will eventually become available in this area. If a sewer connection is available, he would be able to develop 4 lots, in addition to his own lot, on the subject parcel.

5. The applicant argues that the proposed fill area is not lakebed because it was farmed at one time, prior to installation of a dam that he argues artificially raised water levels. However, there is no serious dispute that the proposed fill area is below the currently existing OHWM. A Conditional Use Map prepared for Mr. Eichstadt in 1980 by his consulting engineering firm, Martenson and Eisele, Inc., identified the Ordinary Highwater Mark (OHWM) at elevation 748.50. (Exhibit 5) The proposed fill area was identified as "marsh" on this map. The applicant's expert confirmed these facts under cross-examination. Fassbender confirmed this approximate contour by a site inspection. Further, Fassbender noted that this elevation contour was a common OHWM elevation in this area along Lake Winneconne. If a permit were issued for the filling of the area behind the riprap as set forth on the application, the applicant would be filling in an area below the OHWM elevation, and thus would be filling the lakebed of Lake Winneconne.

(Koch, Fassbender, Exhibit 6) Much of the proposed fill area consists of wetlands directly connected at the north end to Lake Winneconne. (Id.)

The applicant previously sought to establish a bulkhead line and fill essentially the same area of lakebed by way of an application of the Town of Winneconne. The Town's application to establish a bulkhead line was denied by the Department, because the DNR found that it did not meet the requirements of sec. 30.11, Stats. (See: Findings of Fact, Exhibit 18) The Town did not appeal the Department's denial. Eichstadt was found not to have standing to appeal, because sec. 30.11, Stats., allows only "... (a)ny municipality" ... to seek to establish a bulkhead line subject to Department approval.

In the absence of a lawfully established bulkhead line, or a lakebed grant authorized by the state legislature, the DNR does not have authority to authorize the filling of public waterways to benefit a private riparian. (Fassbender)

6. Mr. Eichstadt previously applied for and was granted a permit to protect his property from erosion by the placement of riprap following the contour of the existing shoreline, with the toe of the riprap no more than three feet from the OHWM. (Exhibit 9) The DNR set certain conditions for granting this permit in September of 1992, specifically: that the applicant not fill in the wetland immediately south of the riprap and that placement meet the DNR minimum design standards for riprap projects. However, Fassbender testified that the riprap placement did not meet Department minimum design standards. In particular, the slope of the riprap was inadequate to protect the shoreline from erosion. Further, no filter fabric was used as required. It is likely that the applicant's failure contributed to the recent erosion at the site. The Department has indicated that it would grant the applicant another riprap permit, to be built to minimum design standards, if it did not involve the filling in of lakebed areas.

7. The applicant created an artificial pond on his property by way of a DNR permit granted May 17, 1989. A large amount of excavated material in the form of two large dirt piles remains above ground near the proposed project site. The applicant proposes using this material to accomplish the filling of the wetland area below the OHWM.

It should be noted that the applicant has not complied with the terms of the pond construction permit which required that "... all spoils shall be properly disposed of at a suitable upland site ... and that ... (a)ll disturbed areas shall be mulched and seeded to prevent erosion." (Exhibit 7) In 1992, the Department Area Water Management Specialist Tere Locke sent a letter to Eichstadt seeking removal of the excavated materials next to the pond in accordance with the permit. (Exhibit 7) So far, Eichstadt has failed to accomplish this requirement.

Instead, Eichstadt argues that he was unaware of pond setback requirements at the time the pond was constructed. The pond setback requirements make some of the

applicant's property unbuildable, which drives in part his request to fill in the lakebed area below the OHWM. Wisconsin Administrative Code NR 115 was adopted in the late 1960's. Winnebago County adopted a shoreland zoning ordinance, including setback requirements in the early 1970's. (Koch) The pond setback requirement was therefore in place well before the applicant created the pond.

8. The applicant has not carried his burden of proving that the proposed project would be "not detrimental to the public interest in navigable waters." The proposed fill area consists of emergent wetland vegetation that filters nutrients and other pollutants from surface water runoff. Further, there is some small value of wildlife habitat in the proposed project area.

9. NR 103, Wis. Admin. Code, establishes water quality standards for wetlands to be applied in conjunction with Chapter 30, Stats., permit applications which affect wetland areas. (Fassbender) Fassbender testified that the proposed project does not meet the requirements of NR 103. The project is wetland dependent. The Department found that the project would result in significant adverse impacts to the functional values of the wetland area sought to be filled. In particular,, the proposal would result in destruction of the emergent wetland vegetation that is below the OHWM and landward of the proposed riprap placement. This wetland vegetation filters nutrients and provides wildlife habitat. Further, there are practicable alternatives to filling the wetland, such as construction of a pier or boardwalk to allow access to the open water of the lake. (Exhibit 19)

10. There would be detrimental cumulative impacts to the navigable waters of the state if this project were approved. Fassbender noted that there are many wetland areas below the OHWM but behind sand ridges which interface with the open waters of both Lake Winneconne and nearby Lake Poygan. To allow filling of the public lakebed for private development would likely lead to similar requests to filling of these areas, resulting in a cumulative loss of important wetland areas and the functions they serve in protecting the public interest in navigable waters.

11. The Department of Natural Resource has complied with the procedural requirements of sec. 1.11, Stats., and Chapter NR 150, Wis. Admin. Code, regarding assessment of environmental impact.

### CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority under secs. 30.12 and 227.43(1)(b), Stats., and in accordance with the foregoing Findings of Fact, to issue or deny a permit for the construction and maintenance of structures and fills on navigable waterways.

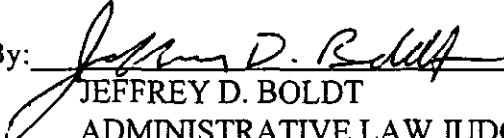
2. The applicant is a riparian owner within the meaning of sec. 30.12, Stats.
3. The proposed fill and riprap described in the Findings of Fact constitute structures within the meaning of sec. 30.12, Stats.
4. The project is a type III action under sec. NR 150.03(8)(f)4, Wis. Admin. Code. Type III actions do not require the preparation of a formal environmental impact assessment.
5. The DNR must consider the cumulative impacts of approving individual projects under Chapter 30, Stats., Hixon v. PSC, 22 Wis. 2d 608, 619, 146 N.W.2d 577 (1966). Accord: Sterlingworth Condo. v. DNR, 205 Wis. 2d 702, 706 \_\_ N.W.2d \_\_ (Wis. Ct. App. 1996).
6. The State of Wisconsin holds in public trust the title to the beds of all lakes up to the line of the OHWM. Such lands below the OHWM need not be navigable in fact to constitute lake bed held in trust for the public. State v. Trudeau, 139 Wis. 2d 92, 106, 408 N.W.2d 337 (1987).
7. The public interest in navigable waters does not include offshore socio-economic impacts. WED v. DNR, 115 Wis. 2d 381, 410, 340 N.W.2d 722 (1983).

#### ORDER

WHEREFORE IT IS HEREBY ORDERED that the permit application be DENIED.

Dated at Madison, Wisconsin on May 30, 1997.

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS  
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By:   
JEFFREY D. BOLDT  
ADMINISTRATIVE LAW JUDGE

## NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.